Supreme Court, U.S.
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No. 96-116

In the Supreme Court of the United States

OCTOBER TERM, 1995

AUTOZONE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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30 pp

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that: (1) petitioner's decision to withhold a planned and expected wage increase during a representation election violated Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3); (2) a speech by petitioner's Vice-President blaming that withholding on the Union violated Section 8(a)(1) of the Act; and (3) a speech by petitioner's Chief Executive Officer threatening closure of the plant if the Union won the election and permanent job losses following a strike violated Section 8(a)(1) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is unpublished, but the decision is noted at 83 F.3d 422 (Table). The decision and order of the National Labor Relations Board (Pet. App. 25-28), and the decision of the administrative law judge (Pet. App. 29-164), are reported at 315 N.L.R.B. 115.

JURISDICTION

The court of appeals entered its judgment on April 24, 1996. The petition for a writ of certiorari was filed on July 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Section 8(a)(1) of the Act makes it an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of th[ose] rights." 29 U.S.C. 158(a)(1). Section 8(a)(3) further prohibits employers from "discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

2. a. Petitioner distributes and sells automotive parts throughout the United States. In late 1992, the General Drivers, Warehousemen and Helpers, Local Union No. 28, International Brotherhood of Teamsters, AFL-CIO (Union) began an organizing campaign at petitioner's Greenville, South Carolina distribution center. Pet. App. 2. When the company refused to recognize the Union, the Union filed a representation petition with the National Labor Relations Board (Board). The Board subsequently scheduled a representation election for March 5, 1993. *Ibid.*

b. Petitioner annually adjusts the pay for employees at its distribution centers. Pet. App. 60; see also *id.* at 3. The adjustment depends upon a wage survey, which determines whether the company's wages are competitive in that area. Because it depends upon a study of regional factors, the wage adjustment may vary from one distribution center to another. Fur-

thermore, no adjustment is guaranteed if the survey reveals that the current pay scale is competitive. *Id.* at 60-61; see also *id.* at 3.

In November 1992, petitioner's Vice-President, Dennis Roberts, visited the Greenville distribution center. In response to questioning by employees, Roberts stated that he expected them to receive a wage increase of between four and five percent, but this had not yet been confirmed. Pet. App. 4. Roberts reiterated this expectation two weeks later. *Ibid.*

By early January 1993, a wage survey for Greenville had been completed, which demonstrated that a wage adjustment in excess of five percent was appropriate. Pet. App. 5, 63. This information, along with survey data for petitioner's other distribution centers, was submitted to Roberts in early January. On January 11, 1993, Roberts recommended, and the petitioner's President approved, wage adjustments for all of petitioner's distribution centers, except Greenville. *Id.* at 4-5, 62.

On January 22, 1993, Roberts delivered a speech to the Greenville employees in opposition to the Union's representation petition. Addressing the withholding of the wage adjustment, Roberts stated:

> A number of you have asked when or if the 4 to 5 percent increase we had mentioned back in December would be going through. You need to understand that the numbers we mentioned in December were a tentative forecast only. After that time, we decided to re-evaluate the pay situation in this market. Before we were able to gather all the data we needed and reach a final decision, however, the Teamsters' petition came in. Our understanding of the law is that we cannot make changes in the

> pay or benefits once a petition comes in, unless the decision had been finalized beforehand. We very much regret that the union's poor timing has now tied our hands, but we do not intend to violate the law. The thing to keep in mind, though, is that once the union is beaten in the election—and we feel confident that is exactly what is going to happen here—then we will be able to move forward, free of the restrictions that we now live under.

Pet. App. 5-6. In a question-and-answer session following the speech, Roberts told the Greenville employees that the average pay increases being implemented that day at the other distribution centers ranged from twelve to fifteen percent. *Id.* at 20, 104.[1]

c. On February 19, 1993, approximately two weeks before the election, petitioner's Chairman and Chief Executive Officer, J.R. Hyde, delivered a speech to the Greenville employees. Hyde stated that the Union strikes "100 percent of the time," and then continued:

> Nobody wins a strike. At each of the cases I mentioned, both the company and [the Union] survived the strike and are still around. [The distribution center in] Nashville is still operating today full bore. So is Sikeston and so is Memphis. The only part of the equation not still there are the employees who allowed the Teamsters to call them out on strike. * * * [T]he 185 strikers at our

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[1] The court of appeals initially attributes this statement to another employee (Ferguson). Pet. App. 6. The Board found, however, that Roberts made the statement, and this was not a fact in dispute. *Id.* at 104. The court of appeals corrected its error later in the opinion, correctly attributing the statement to Roberts. *Id.* at 20.

> Nashville warehouse who walked out on an illegal wildcat strike were all fired. Those 185 employees did not get to vote. Not one of them has ever gotten his job back. The strikers in Memphis and Sikeston were all replaced, and none of them have gotten their jobs back to this day. In fact, there is no union today in the Nashville [distribution center], the Sikeston [distribution center], or the Memphis [distribution center].

Pet. App. 8-9. Hyde concluded: "[The Union's] record with me and your management team is just about as bad as you can get. * * * I know, as sure as I'm standing here, that if I let anyone—here or anywhere else in this company—think [the Union] is in charge, I might as well close the doors, put a lock on the gate, and throw away the key. I will not let [the Union], with [its] record and [its] own agenda, destroy what you and I have built." *Id.* at 9-10.

d. The Board conducted an election among the Greenville employees on March 5, 1993, as scheduled. The Union lost the election by a vote of 135 to 57. Pet. App. 2.

2. On November 9, 1993, the Board's General Counsel issued a complaint against petitioner alleging, among other things, that petitioner's decision to withhold the scheduled wage increase from the Greenville employees violated Section 8(a)(3) of the Act, and that Roberts' and Hyde's speeches to the Greenville employees violated Section 8(a)(1) of the Act. Pet. App. 34-35, 58, 80.

a. Following a hearing, the administrative law judge (ALJ) found that petitioner violated Section 8(a)(3) of the Act by withholding a planned and expected pay adjustment because of the Union's petition

and the union activities of Greenville employees. Pet. App. 158, 159. The ALJ specifically found that Roberts was not a credible witness and rejected as untrue Roberts' assertion that the pay adjustment process was frozen on the advice of counsel and arose from a concern that implementing the increase during an election campaign would have been illegal. *Id.* at 107. Instead, the ALJ found that "a motivating factor in [petitioner's] failure" to go forward with the pay adjustment "was the fact that the employees had assisted the Union and [petitioner] wanted to postpone the Greenville pay increase in order to help defeat the Union at the election which would be held." *Id.* at 108; see also *id.* at 107 ("Roberts put aside his analysis of the Greenville [distribution center] pay raise matter * * * not because of any concern over the legality of implementing a pay increase at Greenville, but because of a desire to exploit the pay raise issue in the election.").

The ALJ further found that Roberts' representation to the employees that the pay increases implemented at the other distribution centers averaged from twelve to fifteen percent was, if not "false," then "at best * * * misleading" (Pet. App. 104, 106), and that this misrepresentation was "no accident, but a deliberate attempt to deceive" the Greenville employees and to "tantaliz[e] his listeners at Greenville about averages elsewhere of 12 to 15 percent, in conjunction with * * * reciting how the pay increase matter had to be set aside because of the 'poor timing' of the Union's petition." *Id.* at 106. "Roberts did this," the ALJ concluded, "as part of [petitioner's] strategy of inciting the anger of the Greenville employees toward the Union, and the greater the percentage of the pay raise they were

missing out on the greater their anger and the greater the chance they would vote NO on March 5." *Id.* at 106-107.

b. The ALJ also found that Roberts' January 22, 1993, speech to the Greenville employees violated Section 8(a)(1) of the Act. Pet. App. 65. Relying on "well established" Board precedent, the ALJ held that "an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene." *Id.* at 63 (quoting *Atlantic Forest Prods., Inc.*, 282 N.L.R.B. 855, 858 (1987)). An employer is permitted to delay a planned wage adjustment only if "the '*sole* purpose' of the postponement is to avoid the appearance of influencing the election's outcome" and the employer "avoid[s] attributing to the union the onus for the postponement of adjustments in wages or benefits, or disparaging and undermining the union by creating the impression that it stood in the way" of the employees receiving the planned adjustment. Pet. App. 63 (emphasis added). The ALJ found that Roberts' speech violated Section 8(a)(1) because "the sole purpose of Roberts' announcement * * * was to encourage a vote NO" by "blam[ing] the Union's 'poor timing' for the postponement." Pet. App. 65. "Not only would Roberts' words incite anger against the Union, and remind employees how to take revenge (beat the Union in the election)," the ALJ observed, but they also "promise[d] the thrill of victory, after the Union [was] beaten, in the form of [petitioner] being able 'to move forward, free of the restrictions that [it] now live[d] under.'" *Ibid.*

c. In addition, the ALJ found that Hyde's February speech to the Greenville employees violated Section 8(a)(1) of the Act by "unlawfully threaten[ing] loss of jobs for strikers who participate in lawful strikes."

Pet. App. 84. The ALJ explained that "employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement." *Id.* at 83 (quoting *Larson Tool & Stamping Co.*, 296 N.L.R.B. 895 (1989)). Rather, employers must clarify that replaced employees may be placed on a preferential hiring list and will be recalled when a permanent replacement leaves the position. Pet. App. 83 n.3. Hyde's description of what had happened to strikers at the other distribution centers, when combined with his statement that "the Teamsters strike '100% of the time,'" the ALJ found, left the "clear" "overall message" that "a successful vote for the Union means that there will be a strike, that the strikers will be replaced, and that the replaced strikers will lose their jobs." *Id.* at 84. The ALJ further found that Hyde's statement about closing the company's doors was unlawful because it "threatens to retaliate for a Union victory by closing the plant." *Id.* at 86.

d. On September 30, 1994, the Board affirmed the ALJ's findings and ordered petitioner to complete the wage adjustment process for the Greenville distribution center and to implement it retroactively. The Board also set aside the results of the March election and ordered a new election. Pet. App. 25-26, 158-159.[2]

3. In an unpublished decision, the court of appeals enforced the Board's order. Pet. App. 1-21. The court

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[2] The Board also agreed with the ALJ that petitioner had committed numerous other unfair labor practices during the Union's organizing campaign, including removing Union materials from company bulletin boards and imposing a "gag rule" on employee conversations about the Union. Pet. App. 25, 52-55, 69-72. The court of appeals upheld these findings, *id.* at 12-15, and petitioner does not challenge them here.

held that substantial evidence supports the Board's factual findings and that there are no legal errors in the decision. *Id.* at 12. Specifically, the court of appeals ruled that the "record fully supports" the Board's finding that anti-union animus underlay petitioner's decision to withhold the pay adjustment. *Id.* at 18. The court further found "supported by the record" the Board's determination that "Roberts exploited his decision and the resulting wage adjustment denial, using it as a weapon during his January 22 speech." *Id.* at 20. Petitioner's contrary argument that Roberts acted to avoid the appearance of unlawful vote buying was rejected by the ALJ and, the court noted, "[petitioner] has failed to show any basis for disturbing th[at] credibility determination[]." *Ibid.*; see also *id.* at 21 ("the record supports the Board's finding that [petitioner] suspended its anticipated wage adjustment procedure because the employees had assisted the Union and because [petitioner] wanted to postpone the pay increases in order to help defeat the Union at the election"). Finally, the court of appeals concluded that "the record substantially supports [the Board's finding] that Chairman Hyde's speech contained both a threat of plant closure and permanent loss of employment." *Id.* at 16-17.

ARGUMENT

Petitioner's argument is premised on factual assertions that are contrary to the facts found by the ALJ, adopted by the Board, and affirmed by the court of appeals. Because petitioner does not challenge the legal standards employed or the application of the law to the facts actually found by the Board, and because the court of appeals' decision is correct and not in

conflict with the ruling of any other circuit, further review is not warranted.

1. Petitioner's principal contention (Pet. 15-25) is that the court of appeals erred in finding that petitioner's decision to withhold the wage increase from the Greenville employees was unlawful under Section 8(a)(3) of the Act. Petitioner claims that it had no established practice of granting wage adjustments and that it acted out of a fear that the wage increase would be perceived as illegal vote buying.

These factual contentions were specifically rejected by the ALJ, the Board, and the court of appeals. The court of appeals, like the Board, rejected petitioner's claim that its wage adjustment history was "erratic in both timing and amount." Pet. App. 20. The court found instead that "there had been an annual average adjustment at Greenville in 1989, 1990, and 1991," that "there was a company wide practice of granting adjustments at all of its distribution centers in January," and that "[petitioner] led its employees to believe that some kind of wage increase would be forthcoming in 1993." *Ibid.* The court further found that Roberts' testimony that the wage adjustment was withheld out of concerns about its legality was "discredited," that the company had demonstrated no basis for disturbing that credibility determination, and that "the record supports the Board's finding that petitioner suspended its anticipated wage adjustment procedure," not because of concerns about its illegality, but "because the employees had assisted the Union and because [petitioner] wanted to postpone the pay increases in order to help defeat the Union at the election." *Id.* at 19-21.

This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v.

Johnston, 268 U.S. 220, 227 (1925); cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("[a] court of law, such as this Court is, * * * cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"), aff'd on reh'g, 339 U.S. 605 (1950). The task of evaluating whether an agency's decision is supported by substantial evidence, moreover, belongs "primarily" to the court of appeals: "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974).

It is clearly settled law that scheduled wage adjustments cannot be withheld because of anti-union animus. See, *e.g.*, *NLRB* v. *Otis Hosp.*, 545 F.2d 252, 254-256 (1st Cir.), enforcing 222 N.L.R.B. 402 (1976); *Atlantic Forest Prods., Inc.*, 282 N.L.R.B. 855, 858-859 (1987); *Emory Nursing Home, Inc.*, 260 N.L.R.B. 540, 555 (1982). Accordingly, this Court's review is not warranted.[3]

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[3] The cases cited and discussed by petitioner (Pet. 17-20, 21-25) in an effort to demonstrate confusion in the legal standard are inapposite because they did not involve an employer whose conduct was found to have been motivated by anti-union animus. See *Bowling Green-Warren County Community Hosp.* v. *NLRB*, 756 F.2d 41, 44 (6th Cir. 1985) ("there is no substantial evidence in the present record to support a finding of intentional discrimination"; parties had stipulated that the "withholding of an increase * * * was based *solely* on the advice of counsel"); *NLRB* v. *Service Garage, Inc.*, 668 F.2d 247, 248-249 (6th Cir. 1982) (employer had no past practice of granting wage increase; employer did not attribute delay in any possible increase to union or discuss basis for postponement with employees); *J.J. Newberry Co.* v. *NLRB*, 645 F.2d 148,

2. Petitioner also contends (Pet. 11-14) that the court of appeals erred in finding that Roberts' January speech violated Section 8(a)(1) of the Act, because Roberts allegedly "was merely informing employees of [p]etitioner's obligation under the Act, which is lawful." Pet. 12.

Like petitioner's previous contention, this argument invites this Court to sit in review of factual findings made by an agency and affirmed by the court of appeals. The Board found, and the court of appeals agreed, that Roberts' speech was "part of [petitioner's] strategy of inciting the anger of the Greenville employees toward the Union." Pet. App. 106. Roberts did not merely inform employees of the legal status of their wage adjustment. He specifically blamed the Union for the withholding and "strongly implied that a vote against the Union would restore [petitioner's] freedom to grant the pay increase." *Id.* at 20.

Roberts' purported explanation of the law, moreover, was incorrect. In deciding whether to withhold a planned increase in wages, "[a] company is supposed to act as though the union were not present," *NLRB* v. *Industrial Erectors, Inc.*, 712 F.2d 1131, 1135 (7th Cir. 1983). Otherwise, "[e]mployees will predictably consider that the union is somehow responsible for their failure to receive expected raises." *Plasticrafts*,

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152-153 (2d Cir. 1981) (employer took "pains to refrain from capitalizing on the withholding" of a wage increase; "the withholding did not have an anti-union purpose or effect"); *NLRB* v. *Planters Peanuts*, 574 F.2d 400, 401, 405 (8th Cir. 1978) (per curiam) (employer acted "in good faith" and was not "trying to undermine the Union, or attempting to influence the votes of the employees"); *Free-Flow Packaging Corp.* v. *NLRB*, 566 F.2d 1124, 1130 (9th Cir. 1978) ("the circumstances were not such as to give rise to an inference of antiunion motive").

Inc. v. *NLRB*, 586 F.2d 185, 188 (10th Cir. 1978). See also Pet. App. 63 (discussing *Atlantic Forest Prods., Inc., supra*). Because the Greenville wage increase was "planned and expected" (Pet. App. 20), Roberts lawfully could have advised the employees that petitioner would move forward with the wage adjustment process without regard to the fact that a representation petition had been filed. Alternatively, petitioner could have advised the employees that it would postpone the increase until after the election, provided that the company also made clear that the postponement was solely to avoid any appearance of an attempt to influence the election and refrained from making statements designed to undermine employee support for the Union. See *id.* at 64 (discussing *Atlantic Forest Prods., Inc., supra*).[4]

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[4] Petitioner errs in asserting (Pet. 11) that *Atlantic Forest Prods., Inc.* is "contrary to previous Board law." That decision simply restated and applied principles previously established by the Board in *Uarco, Inc.*, 169 N.L.R.B. 1153 (1968). See *Atlantic Forest Prods., Inc.*, 282 N.L.R.B. at 857-859. Also without merit is petitioner's suggestion (Pet. 11 n.5, 12-13) that the finding that Roberts' speech was unlawful is inconsistent with prior Board decisions. None of the cases relied upon by petitioner involved an employer who used its decision to withhold a benefit as a means of undermining employee support for the union. See *Hovey Elec., Inc.*, 302 N.L.R.B. 482 (1991) (employer "did not attribute the decision [not to disclose a promised wage plan] to the union or the union campaign"), enforcement granted in part and denied in part on other grounds, 964 F.2d 543 (6th Cir. 1992); *Cutter Labs., Inc.*, 221 N.L.R.B. 161, 169 (1975) (evidence "does not establish that the [employer] sought to capitalize on the absence of the wage increase as an issue with which to undermine the Union"); *Great Atlantic & Pacific Tea Co.*, 192 N.L.R.B. 645, 646 (1971) (no evidence that "[the employer] in any way sought to capitalize on the absence of a wage increase by connecting

3. Finally, petitioner's contention (Pet. 27) that Hyde's February speech is protected by Section 8(c) of the Act is without merit. Section 8(c) provides, in pertinent part, that "[t]he expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c). Because his comments contained threats of reprisal through closing the plant (Pet. App. 16-17), Hyde's speech falls beyond Section 8(c)'s aegis. Given "the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 620 (1969)), the Board's finding of improper coercion, which was upheld by the court of appeals, raises no issue meriting this Court's review. In any event, the court of appeals' decision fully comports with this Court's precedent. See *id.* at 619 (speech improper where petitioner characterized union as "strike-happy," threatened that strike would lead to a plant shutdown, and indicated that the strike would likely leave the employees out of work).[5]

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the absence with the Union or the employees' support of the Union").

[5] Petitioner's contention (Pet. 25-26; see also Pet. 14) that, in determining whether speech was coercive, the Board and the court may examine only the written text of the speech and must ignore its implications is meritless. *Gissel*, 395 U.S. at 617 ("[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting * * * tak[ing] into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up

Lastly, petitioner's contention (Pet. 28-29) that Hyde's speech was not unlawful because, nearly a month earlier, unspecified "members of management" had informed the Greenville employees of their striker reinstatement rights[6] is without merit and undeserving of this Court's review. Neither the Board nor the court made a finding that management actually made these statements. In any event, given the substantial time lag between these alleged discussions and Hyde's speech, whatever information may have been conveyed at those meetings would have been nullified by Hyde's subsequent coercive statements, equating a Union victory with the inevitability of strikes and with permanent loss of employment with petitioner. See Pet. App. 17.

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intended implications of the latter that might be more readily dismissed by a more disinterested ear").

[6] See *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968) (permanently replaced economic strikers, who have made an unconditional offer to return to work, are entitled to full reinstatement when positions become available, and to placement on a preferential hiring list if positions are not available), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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